United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

389

No. 24,387

UNITED STATES OF AMERICA,

Appellee

v.

WILLIAM BENNETT,

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

J. G. Dail, Jr.
Attorney for Appellant
(Appointed by this Court)

Of Counsel:

CROFT, DAIL & VANCE
1111 E Street, N. W.
Washington, D. C. 20004

Date due: February 16, 1971

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Were appellant's Constitutional rights violated by the failure of the Government psychiatric witnesses to disclose a material fact concerning the treatment of appellant during the observation period which was the basis for their opinion testimony?

2. Was it a violation of statute and error on the part of the Trial Court to permit disclosure by a Government psychiatrist, over appellant's objection, of confidential communications relating to the issue of guilt, which communications were obtained during a court-ordered mental examination?

3. Was it error for the Trial Court to fail to exercise its discretion and order a bifurcated trial on the issues of guilt and sanity?

(The pending case has not previously been before this Court.)

STATEMENT OF THE CASE

This is an appeal from the United States District Court for the District of Columbia from a judgment of conviction following a trial before a judge and jury on a charge of sodomy in violation of Title 22, D.C. Code, §3502.

Course of Proceedings

In a two-count indictment returned in the District Court on July 10, 1968, appellant was charged with, on or about May 10, 1968, (1) taking indecent liberties with a minor child in violation of Title 22, D. C. Code, §3501(a), and (2) sodomy committed upon a male person under 16 years of age in violation of Title 22, D. C. Code, §3502. By Order of the District Court entered August 23, 1968, under Title 24, D.C. Code, §301, appellant was committed to St. Elizabeths Hospital for 60 days for examination as to his mental competency to stand trial and his mental condition

at the time of the alleged offense. The Hospital's report was returned October 30, 1968, and the Court found on November 21, 1968, that appellant was mentally competent for trial. Appellant was tried on March 4-7, 1969, before a jury, which found appellant guilty on count two (sodomy) of the indictment and returned a special finding that the complainant was under the age of 16 on May 10, 1968. Appellant's motion for new trial or judgment of acquittal was denied by the Trial Court on April 4, 1969.

Disposition Below

On April 18, 1969, the Trial Court continued sentencing until receipt of a report from St. Elizabeths Hospital.[1/] On April 24, 1970, over one year later, the Trial Court found appellant competent to be sentenced[1/] and sentenced him to imprisonment for 4 to 15 years.

Government's Evidence

Lawrence Morgan, the complaining witness, identified appellant as the person who committed an act of anal and oral sodomy upon him at the LaSalle School playground on the night of May 10, 1968. (Tr. 8, 17, 29-38, 47)[2/] He did

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1/ Docket entry in District Court's docket.

2/ "Tr." refers to transcript of testimony.

not know his attacker, and he stated that appellant at the trial weighed 50 or 60 pounds less than the attacker. (Tr. 47, 54) Three friends of the complainant identified appellant as being present on the playground prior to the attack.[3/] The complainant's mother, who had called the police, also testified. (Tr. 153) A physician (Dr. Lawrence) examined the complainant early the following morning and found a laceration and blood near his rectum. (Tr. 62-64) A police officer identified complainant's undershorts, and an F.B.I. agent testified that seminal stains were found on them. (Tr. 156-157, 161) A metropolitan police detective who arrested appellant two days later testified that he thought appellant should see a psychiatrist because of his unusual actions. (Tr. 139-142) Two psychiatrists (Drs. Kunev and Platkin) were presented by the Government.[4/] It is believed that a discussion of their testimony will be more helpful in the Argument. The

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3/ Witnesses Rochee, Tr. 70, 79-81, 86, 87; Berry, Tr. 93, 95-97; Ross, Tr. 124, 126-127.

4/ Although they were technically called as rebuttal witnesses, in order to keep the trial moving the actual order of testimony was: Dr. Kunev, Dr. Goldberg (for appellant), Dr. Platkin, and Dr. Kirby (for appellant).

final witness (Griffin) was called by the Government after the defense rested. He was a friend of appellant who had been with him at the playground and who had seen him with the complainant. (Tr. 357-362)

Appellant's Evidence

Appellant testified in his own behalf. He denied knowing the location of the playground, being known by a nickname by which some of the Government's witnesses had identified him, or knowing anything about the events at the playground on May 10, 1968. (Tr. 183, 185-186) The remainder of his testimony, which was quite confused, related primarily to his confinements in St. Elizabeths. (Tr. 186-190) Appellant's mother and brother described the behavior of appellant prior to his arrest. (Tr. 195-197, 205-207) The testimony of two defense psychiatrists (Drs. Goldberg and Kirby) will be discussed more fully below.

STATUTES INVOLVED

District of Columbia Code, Title 22, §3502, provides in part:

> "(a) Every person who shall be convicted of taking into his or her mouth or anus the sexual organ of any other person or animal, or who shall be convicted of placing his or

her sexual organ in the mouth or anus of any other person or animal, or who shall be convicted of having carnal copulation in an opening of the body except sexual parts with another person, shall be fined not more than $1,000 or be imprisoned for a period not exceeding ten years. Any person convicted under this section of committing such act with a person under the age of sixteen years shall be fined not more than $1,000 or be imprisoned for a period not exceeding twenty years. * * *

"(b) Any penetration, however slight, is sufficient to complete the crime specified in this section. Proof of emission shall not be necessary."

United States Code, Title 18, §4244, provides in part:

"Whenever after arrest . . . the United States Attorney . . . shall file a motion for a judicial determination of such mental competency of the accused . . . . Upon such a motion or upon a similar motion in behalf of the accused, or upon its own motion, the court shall cause the accused . . . to be examined as to his mental condition. . . . No statement made by the accused in the course of any examination into his sanity or mental competency provided for by this section, whether the examination shall be with or without the consent of the accused, shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding. . . ."

ARGUMENT

I.

THE GOVERNMENT'S FAILURE TO DISCLOSE EVIDENCE FAVORABLE TO APPELLANT ON THE ISSUE OF HIS SANITY WAS A VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHTS AND REQUIRES A NEW TRIAL.

(Reference is made under this point to Transcript pages 211-212, 217-234, 236-255, 257-268, 271-289, 290-305, 311-324, 337-355.)

A. Facts.

Some discussion of appellant's history and of the psychiatric testimony presented is necessary in order to explain fully appellant's position on this point.

Appellant has been a patient in St. Elizabeths Hospital several times:

1. June 3, 1965, to February 24, 1966. (Tr. 222) Returned as "socially recovered." (Tr. 230-231)

2. March 15, 1967, to March 24, 1968. (Tr. 222) Appellant was serving a sentence for robbery, and his good time-release date was April 25, 1968 (Tr. 246), about 15 days prior to the crime for which he was convicted here.

3. August 27, 1968, to October 30, 1968. Observation period. (Tr. 217)

4. March 19, 1969, to present. Transferred to St. Elizabeths while under sentence for robbery, full term release date being April 25, 1970.[5/] As indicated, appellant was sentenced in this proceeding on April 24, 1970, so that his confinement in St. Elizabeths has continued uninterrupted.

Dr. Goldberg, a defense psychiatrist, examined appellant five times between May 1965, and March 1967, and on two of those occasions signed papers necessary to have appellant transferred to a mental hospital. Observations of appellant were at Lorton Youth Center, where appellant was a serious disciplinary problem, was dangerous as a firebug, and was making strange gestures and mumbling to himself. The witness described appellant's unintelligent gestures, inappropriate affect (i.e., general mood) and smiling, his hearing of voices and noises, and his looseness of verbal association. The diagnosis was acute, undifferentiated schizophrenic illness. (Tr. 260-262) During examinations in June, August, and October 1966, the witness considered that appellant's

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5/ This fact appears in the records of St. Elizabeths Hospital.

illness was in partial remission and that he was not grossly psychotic and, therefore, not committable. (Tr. 264-265) On March 3, 1967, appellant's condition had become more severe, and the witness again suggested transfer to a mental hospital. (Tr. 266-267) In his opinion, it was unlikely that the illness, which is chronic and fluctuating, had disappeared by May 1968. (Tr. 273, 289) Cross-examination emphasized the brief duration of the witness's interviews of appellant. Although he was of the opinion that appellant was not malingering, the witness conceded that the chances of being misled are greater if he is not able to follow the patient, see him frequently, and have constant observation reports. (Tr. 274-281, 288)

Dr. Kirby, a defense witness, examined appellant on January 10, 1969, at which time appellant exhibited extreme behavior; the interview was terminated quickly because the witness was concerned about a loss of control. His opinion was that appellant was suffering from an exacerbation of the schizophrenic reaction, and he recommended commitment to St. Elizabeths. (Tr. 340-341)

The first Government psychiatrist was Dr. Kunev, who is on the staff of St. Elizabeths. (Tr. 211) He had been appellant's administrative doctor between July 1967, and March 1968, and appellant was assigned to him during the August-October 1968 observation. (Tr. 221-222) He described in detail the hospital's mental examination procedures, including psychological testing, continuous observation by the nursing staff, review of outside information, personal interviews, and the diagnostic medical staff conference. (Tr. 217-220) The opinion of the staff conference and the witness was that appellant "was not suffering from mental illness on the day of the alleged offense. . . ." (Tr. 223) This was not an easy conclusion to reach because it was necessary to "remove" the allegedly conscious attempt by appellant to convince the hospital that he is mentally ill. (Tr. 224, 240-241) In his opinion, appellant was malingering because he preferred the hospital to the jail. (Tr. 232-234) Although the psychiatrists who admitted appellant to St. Elizabeths in 1965 and 1967 had concurred in Dr. Goldberg's diagnosis (Tr. 228-232, 243, 247-248), Dr. Kunev found in this no inconsistency with his opinion because the previous diagnoses were based on initial contacts rather than prolonged observation.

> ". . . we have much more facts and much more information than just the initial impression of Doctor Goldberg and the initial impression of the admitting Doctor. Our impression was not initial, it was based on most [sic] of the evaluation, observation, and trying to find out the answer, so we had more facts to deal with." (Tr. 254-255)

Dr. Platkin, a Government witness, is clinical director of the Maximum Security Division of St. Elizabeths. (Tr. 290) His only contact with appellant was during the staff conference referred to. (Tr. 293-294) In his opinion, appellant "was not suffering from any mental disorder at the time I observed him or on May 10, 1968," but was feigning illness. (Tr. 296, 298) The specific basis for this opinion is:

> "Well, actually, in effect the absence of any symptomology [sic] which in my opinion would indicate he was suffering from a mental illness." (Tr. 296)

Although admitting that an acute schizophrenic condition can disappear in a relatively short time, he characterized Dr. Goldberg's examination of appellant as "cursory" and stated that a mistaken conclusion of mental illness could result if the psychiatrist did not have an opportunity to see the patient for a long period of time. (Tr. 299-300, 320, 322)

B. Psychotropic Medication.

Schizophrenic reactions are recognized by a number of manifestations, or symptoms, such as odd and bizarre behavior, aloofness, suspiciousness, impulsive destructiveness, and immature and exaggerated emotionality, often ambivalently directed and considered inappropriate by the observer; in the more serious stages, perceptions may be distorted by delusional and hallucinatory material. At the same time, however, there may be relatively little impairment of consciousness, orientation, or memory. Noyes & Kolb, Modern Clinical Psychiatry (6th ed. 1963), pp. 325, 329, 341. The pharmacological therapy for schizophrenic reactions provides relief of anxiety and its attendant reflections. Use of some of the so-called psychotropic medications frequently results in disappearance of hallucinations and delusional ideas within the first two weeks of treatment. (Op. cit., p. 358)

At no place in their testimony did the Government psychiatrists advise the jury that appellant was being administered psychotropic medications during the period of observation upon which they based their expert opinions. or during other periods of time. That such administration did occur was discovered by appellate counsel in the course of interviewing the Hospital's staff. Counsel has obtained an official statement from the Hospital verifying this fact, and it is attached hereto as Appendix A for the Court's consideration. Appendix B is the letter of inquiry to which Appendix A replies and is attached for com-

pleteness. Appendix A shows the following chronology:

Aug. 27, 1968	- admitted for observation
Sept. 9	- administration of two psychotropic medications begun
Sept. 17	- dosages increased
Oct. 15	- medication discontinued
Oct. 16	- staff diagnostic conference (Tr. 293)

Thus, appellant was given what appears to be high dosages of psychotropic medication for 36 of the 50 days he was under observation prior to the staff conference. He was given similar treatments during his two prior admissions and was discharged because he responded to them. Indeed, appellant was readmitted to St. Elizabeths less than two weeks after the staff psychiatrists testified that appellant was sane,[6/] and he has been there ever since receiving treatment for the mental illness which the two staff psychiatrists said he did not have.

The failure by the Government psychiatrists to disclose the administration of psychotropic medications assumes added significance because of the disparity in the length of observation by the Government psychiatrists vis-a-vis the defense psychiatrists. The Government repeatedly used this disparity to derogate from the opinions of the defense psychiatrists. Appellant was observed

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6/ Dr. Kirby testified that he recommended commitment on January 10, 1969 (p. 9, supra), but appellant was not committed until after the trial.

by them when he was in the community (jail, in this instance) and not under the influence of medication; these are times when the symptoms of a schizophrenic reaction would be expected to manifest themselves. By contrast, the Government witnesses observed appellant in the controlled, relatively calm environment of a mental hospital and while he was under the influence of psychotropic medication. Although it is the avowed purpose of such medication to alleviate or remove the bizarre behavior which is symptomatic of the schizophrenic reaction, it was the absence of such symptoms which was the basis of the Government psychiatrists' opinion of no mental illness. (Tr. 296; quoted supra, p. 11)

We do not challenge the medical or psychiatric soundness (although it appears questionable to a layman) of a procedure whereby a diagnosis is based upon the absence of symptoms during a period when the patient is being given drugs which remove those symptoms. What we do say is that the jury should have known these facts in order intelligently to weigh the conflicting expert testimony in this case. The disclosure of these facts could well have introduced the reasonable doubt which would have required the jury to find appellant not guilty by reason of insanity.

C. Disclosure Required.

Washington v. United States, 129 App.D.C. 29, 390 F.2d 444 (1967), explicitly requires the psychiatric expert to disclose to the jury a matter of such significance, i.e., the administration of drugs which remove the symptoms which are the basis for a diagnosis.[7/] That information would clearly weaken the basis for the Government psychiatrists' opinions and would give more weight to the opinions of the defense psychiatrists, which were based upon observations not affected by the administration of drugs. The undisclosed fact is material and is one which would have favored the defense, and it is a violation of appellant's Constitutional rights to suppress that fact, regardless of

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7/ The psychiatrist is admonished not to "state conclusions or opinions as an expert unless you also tell the jury what investigations, observations, reasoning and medical theory led to your opinion"; "the jury should know how your opinion may be affected by limitations of time or facilities in the examination"; "if you do give an opinion, you should explain what you did to obtain the underlying facts, what these facts are, how they led to the opinion, and what, if any, are the uncertainties in the opinion." Washington, supra, 390 F.2d at 457-458.

the good faith or bad faith of the Government and its witnesses in doing so. Brady v. Maryland, 373 U.S. 83, 87 (1963); Giles v. Maryland, 386 U.S. 66, 102 (1967); Levin v. Clark, _____ App.D.C. _____, 408 F.2d 1209 (1967). This failure to disclose requires that appellant be given a new trial on the question of his sanity.

II.
THE TRIAL COURT ERRED IN ADMITTING, OVER OBJECTION, CONFIDENTIAL COMMUNICATIONS BETWEEN APPELLANT AND A GOVERNMENT PSYCHIATRIST.

(Reference is made under this point to Transcript pages 179, 181-183, 185-186, 191-194, 224-228)

Government psychiatrist Kunev testified that, in his interviews with appellant during the court-ordered observation, appellant had recalled the events of the alleged offense and had described them "minutely." (Tr. 224-225) Defense counsel's objection to this testimony was overruled by the Trial Court on the basis that Appellant himself had already admitted the offense during his own testimony. (Tr. 226-227)

The reference for mental examination in this case was made under Title 24, D. C. Code, §301(a). It provides for an examination limited to competency to stand trial, but the examination can be expanded to the accused's mental state at the time of the crime. Winn v. United States, 106 App.D.C. 133, 270 F.2d 326 (1959), cert. den., 365 U.S. 848 (1961). The Federal statute controlling such examinations is Title 18, U. S. Code, §4244 (quoted supra, p. 6), which specifically prohibits the use against him on the issue of guilt of any statement made by the accused in the course of such examination. Although 24 D.C. Code 301 does not contain a barring proviso of this nature, the Federal Statute was intended to provide uniform procedure in the Federal courts and is applicable to mental examinations conducted under 24 D.C. Code 301. Edmonds v. United States, 104 App.D.C. 144, 260 F.2d 474, 477 (1958).

The Trial Court's ruling was based upon a misinterpretation of the testimony. Appellant denied knowing the complaining witness or even the location of the place of the offense. (Tr. 182-183, 185-186) At the conclusion of his testimony, he was asked whether he wanted to make any further statement, and he said:

> "A. Well, other than I am not denying the fact that something actually happened, but as far as I am concerned, that it was democratic [sic] and no matter how it happened, I was high on jive. Like I told the doctor, Dr. Kunev, he got on a green coat and a sweater and balding.
> Q. You used the word demographic, what do you mean?
> A. I don't know." (Tr. 191)

This is the statement relied upon by the Trial Court, but it is quite different from an admission by appellant that he committed the offense. It was made only a few minutes after defense counsel, in his opening statement to the jury, said essentially the same thing, that is, the defense did not controvert the fact that an indecent assault had been made upon the complaining witness by someone. (Tr. 179) A reading of all appellant's testimony shows that it was highly confused, disorganized, and in some cases completely unintelligible. The statement relied upon by the Trial Court must be viewed in that context and particularly in the light of defense counsel's opening remark to the jury. It is certainly not the judicial confession which the Trial Court assumed, and it is not a basis for excusing the improper and prejudicial testimony of the Government's psychiatrist.

The statutory privilege was not waived by appellant, and its violation requires a new trial.

III.
THE TRIAL COURT ERRED IN FAILING TO ORDER A BIFURCATED TRIAL ON THE ISSUES OF GUILT AND INSANITY.

(Reference is made under this point to Transcript page 58.)

This Court has established a procedure for separate consideration by the jury of the issues raised by a not guilty plea before the introduction of evidence on an insanity plea. Holmes v. United States, 124 App.D.C. 152, 366 F.2d 281 (1966). A sound exercise of the trial court's discretion will ordinarily require bifurcation where it is shown that a substantial defense on the merits and a substantial insanity defense, or either of them, would be prejudiced by simultaneous presentation with the other. Doubtful situations should be resolved in favor of bifurcation where the evidence on the two issues does not significantly overlap, and a request by defense counsel for bifurcation is not a prerequisite to the exercise of the trial court's discretion. Contee v. United States, 133 App.D.C. 261, 410 F.2d 249, 250 (1969).

The requisite elements for application of the foregoing rule were present here, but the Trial Court did not exercise its discretion and consider whether bifurcation should be ordered. While much of the reasoning which

prompted the Holmes rule related to the adverse effect of evidence of insanity upon the defense on the merits, the Contee decision makes it clear that this works both ways. Here, the evidence of insanity was substantial, but the jury was required to weigh the testimony of two defense psychiatrists against the directly conflicting testimony of two Government psychiatrists and to decide which opinion should be accepted. In addition to the non-disclosure of a material fact (Point I, supra), the failure to have separate trials on these issues must have influenced the jury's consideration of the insanity defense. The offense with which appellant was charged involved a shocking sexual assault on a 13-year-old boy, and the unpleasant details of the attack were reviewed at length. The reaction of many people, including the jurors, may well have been expressed by the complainant himself, who stated to appellant in the presence of the jury:

> "If he tried to do that to me now and as big as I am now, I would kill him, I am telling you that now. I am glad that you think that is funny because I don't, you dirty ass dog. Remember that I said it so when you get out you come looking for me, okay. I am talking to you." (Tr. 58)

It is submitted that the jury could not fairly evaluate the conflicting expert testimony on the question of insanity in view of its exposure, both before and after that expert testimony, to the highly prejudicial information which came to it on the issue of guilt or innocence of the crime charged.

CONCLUSION

Appellant prays that this proceeding be remanded to the District Court for separate trials on the issues of his guilt of the substantive offense and of his sanity.

Respectfully submitted,

J. G. Dail, Jr.
Attorney for Appellant
(Appointed by this Court)

Of Counsel:

CROFT, DAIL & VANCE
1111 E Street, N. W.
Washington, D. C. 20004

Date Due: February 16, 1971

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief was personally served upon the United States Attorney this _____ day of _____, 1971.

_____
J. G. Dail, Jr.

APPENDIX A

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
PUBLIC HEALTH SERVICE
HEALTH SERVICES AND MENTAL HEALTH ADMINISTRATION
NATIONAL INSTITUTE OF MENTAL HEALTH
WASHINGTON, D.C. 20032

NATIONAL CENTER FOR MENTAL HEALTH
SERVICES, TRAINING, AND RESEARCH
SAINT ELIZABETHS HOSPITAL

February 4, 1971

Our Reference: CCS/FP/ERS William Bennett 87,093
Your Reference William Bennett

Mr. J. G. Dail, Jr.
Attorney at Law
Croft, Dail & Vance
1111 E Street, N.W.
Washington, D. C. 20004

Dear Mr. Dail:

In accordance with your letter of December 17, 1970, the following information is submitted in the case of Mr. William Bennett whom you represent in his present appeal.

I will attempt to adhere to the form in which you asked the questions.

Mr. Bennett is diagnosed 295.90 Schizophrenia, Chronic Undifferentiated Type. It is, of course, listed in the official manual of mental disorders and can certainly be called a mental disease or an abnormal mental condition. Schizophrenia does not have physical manifestations; however, is characterized by inappropriate affect or emotional responses, loosening in the associations of ideas so that responses are often tangential or may be completely incoherent. In the extreme there may be delusions and or hallucinations.

Mr. Bennett is now receiving Prolixin Enanthate $\frac{1}{2}$ cc I.M. weekly as a psychotropic medication as well as Kemadrin 5 mgms each morning for the side effects. Since his last admission Mr. Bennett has been actively treated with psychotropic medications to which he responded so that his medication could be reduced and his current dosage is now at maintenance level. In view of his past history of repeated admissions to Saint Elizabeths Hospital, we might expect relapse in one to six months if the medication was entirely discontinued.

Mr. Bennett was readmitted to Saint Elizabeths Hospital for the third time on August 27, 1968, from the United States District Court for the District of Columbia for a 60-day period of mental examination and was discharged on October 30, 1968. The records of that admission indicates that Thorazine 100 mgms b.i.d. and Stelazine 5 mgms b.i.d. were started on September 9. On September 17, Thorazine was increased to 200 mgms b.i.d. and Stelazine to 10 mgms b.i.d. and both were discontinued on October 15. These medications are also psychotropic but, of course, are in higher dosage than the maintenance he now receives.

Mr. Bennett had two prior hospitalizations here at Saint Elizabeths Hospital. He had been sentenced under the Youth Correction Act in April 1963, and was admitted for treatment while serving sentence on June 3, 1965. He responded to psychotropic medication and gradually began to engage in rehabilatative activities. He was discharged to the correctional authorities on February 24, 1966. He was again readmitted on March 15, 1967, and again responded to psychotropic medication. He made a good hospital adjustment and his medication was discontinued in November 1967, in preparation for his return to Lorton since his short-term release date was in the spring of 1968. His improvement was maintained and he was discharged on March 27, 1968.

During his first two hospitalizations Mr. Bennett received varying psychotropic medications in varying dosage. If necessary the record could be reviewed in detail and the exact amounts and dates given; however, this would have little medical meaning.

I hope this information will be of assistance to you.

Sincerely yours,

Elizabeth R. Strawinsky, M.D.

Elizabeth R. Strawinsky, M.D.
Acting Associate Director for
Forensic Programs

APPENDIX A

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February 4, 1971

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Acting Associate Director for
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CROFT, DAIL & VANCE
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JOSEPH G. DAIL, JR.
ANTHONY C. VANCE

TELEPHONE 347-0503
AREA CODE 202

December 17, 1970

Elizabeth R. Strawinsky, M.D.
Acting Associate Director for
Forensic Programs
Saint Elizabeths Hospital
Washington, D. C. 20032

Re: William Bennett 87,093

Dear Dr. Strawinsky:

I am appointed by the United States Court of Appeals for the District of Columbia Circuit to represent Mr. Bennett in a pending appeal from his criminal conviction. Dr. David Rosenman of the Hospital staff has kindly consulted with me concerning Mr. Bennett. As a result of our conversations, I should very much appreciate the Hospital's response to the following inquiries:

(1) What is the diagnosis of Mr. Bennett's condition?

(2) Is the answer to (1) a mental disease or defect or an abnormal mental condition?

(3) Can you explain in lay terms the nature of the condition and some of its physical manifestations?

(4) Is Mr. Bennett now receiving so-called psychotropic medication for this condition? If so, please describe the nature and effect of that medication.

(5) In the Hospital's opinion, what would be the effect of discontinuance of the medication?

(6) Was Mr. Bennett admitted to the Hospital on or about August 23, 1968?

(7) If so, when was he discharged?

(8) What do the Hospital's records show concerning the administration to Mr. Bennett of medication identical to or similar to that described in (4), above, during the period of hospitalization described in (6) and (7), above?

(9) Mr. Bennett was also hospitalized for a prior period which terminated about April 1968. Can you give me the dates of that hospitalization?

(10) During the period described in (9), above, what do the Hospital's records show concerning medication of the type described in (4), above?

It is my present plan to submit your answers to the Court in connection with the question whether Mr. Bennett's mental condition should be further considered by it at this time.

Yours truly,

J. G. Dail, Jr.

JGD:ph

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,387

UNITED STATES OF AMERICA, *Appellee*,

v.

WILLIAM BENNETT, *Appellant*.

Appeal from the United States District Court
for the District of Columbia

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
CHARLES H. ROISTACHER,
Assistant United States Attorneys.

Cr. No. 1026-68

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TABLE OF CASES

• Cases chiefly relied upon are marked by asterisks.

OTHER REFERENCES

ISSUES PRESENTED *

In the opinion of appellee, the following issues are presented:

1. Whether, after appellant raised the defense of insanity, the evidentiary doctor-patient privilege was violated when a psychiatrist testifying as a rebuttal witness for the Government related the underlying factual reasons for his opinion that appellant was not mentally ill?

2. Whether appellant was entitled to a bifurcated trial when his defense on the merits was at best a mere denial that he was guilty?

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* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,387

UNITED STATES OF AMERICA, *Appellee,*

v.

WILLIAM BENNETT, *Appellant.*

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By a two-count indictment filed July 10, 1968, appellant was charged with committing sodomy on a thirteen-year-old boy (22 D.C. Code § 3502) and taking indecent liberties with a minor (22 D.C. Code § 3501(a)). On November 21, 1968, after having been committed to Saint Elizabeths Hospital for a sixty-day mental observation, appellant was found competent to stand trial by Chief Judge Edward M. Curran. On March 4-7, 1969, appellant was tried by Judge Oliver Gasch, sitting with a jury. On the latter date appellant was found guilty of sodomy, with no verdict returned on the lesser included indecent liberties charge. On April 8, 1969, Judge Gasch denied appellant's March 17 motion for a new trial, and on April 24, 1970, appellant was found mentally competent for sentencing and received

a term of four to fifteen years' imprisonment.[1] This appeal followed.

The Case for the Government

Lawrence Morgan, the complainant, testified that at approximately 11:15 p.m. on May 10, 1968, he and some friends stopped at the Riggs Park playground located near the LaSalle School at Riggs and Nicholson Streets, N.E., about two or three blocks from Morgan's home. The boys were returning to their homes after walking to a party which they found had been canceled, and the playground was along the way. Morgan, who was then only thirteen years old, and his friends were conversing among themselves in the playground when suddenly appellant and two companions entered and approached the boys.[2] Appellant stated to the group, "No one move, stop right there" (Tr. 19), and then he specifically engaged young Morgan in a conversation, asking him his name and address. Appellant eventually lured[3] the complainant away from the rest of the group, taking him to the secluded "basketball area" of the playground. Morgan testified that at this point appellant "was talking about [how] he liked me, he dig me [*sic*], and something like that, and he asked me if I know what he was talking about" (Tr. 25). Meanwhile one of Morgan's friends, Arthur Rochee, found appellant and Morgan, and when he came over to tell Morgan that the rest of the group of friends was leaving, appellant told Rochee, "You better leave the playground before I get mad or something" (Tr. 26). Accordingly, Rochee and the other boys left. Again alone in the "basketball area," appellant tried to kiss

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[1] On April 18, 1969, Judge Gasch had continued sentencing pending another report from Saint Elizabeths.

[2] Although this was the first time Morgan had seen appellant, he recognized appellant's companions. One he knew as "Rochester," and the other he knew by sight but not by name (Tr. 49-50).

[3] At first Morgan told appellant that he had to go home, but when appellant persisted in his request that the youth accompany him to the "basketball area," he obliged and went with appellant (Tr. 25).

Morgan. When Morgan protested and told appellant once more that he had to return home, appellant grabbed him and said that if Morgan "didn't cooperate, he would use what he had in his pocket" (Tr. 28). With this threat in mind, young Morgan was forced to submit to what would follow.

Appellant ordered Morgan to pull down his trousers and undershorts, put his hands against the door, and bend over. Appellant then "put it [appellant's penis] in my butt" (Tr. 30). When appellant began moving his penis inside the lad's rectal area, Morgan stood up, causing appellant's penis to come out. Morgan testified that when he told appellant that "it hurt," appellant stated, "It won't hurt no more" (Tr. 32). In the minutes to follow appellant forced Morgan into various positions on his knees and on the ground, and appellant inserted his penis into Morgan's rectal area four more times.[4] Additionally he put his sex organ into the young boy's mouth. Finally, when Morgan told appellant that his mother would call the police "if I didn't get home soon" (Tr. 37), he was permitted to leave. Appellant stated that "he would let me go and he would see me tomorrow" (Tr. 37). Morgan then ran home, took a bath, washed his mouth with Listerine, and told his parents of the twenty to thirty horrifying minutes he had just spent in appellant's company.[5] Soon afterward the police arrived,[6]

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[4] The complainant testified that appellant did not ejaculate while his penis was inserted because "I kept standing up straight" (Tr. 37).

[5] Mrs. Delores Morgan, the complainant's mother, testified that when her son came home at approximately 11:30 p.m. on the night of the crime, his trousers were not on properly and had dust on the knees. He immediately went into the bathroom, and she heard him spit. After learning some of the details of the boy's unpleasant experience, her husband summoned the police (Tr. 148-153).

[6] When Sergeant Frank Rinaldi of the Sex Squad responded to the complainant's home, young Morgan surrendered, at the officer's request, the undershorts that he wore during the incident (Government's Exhibit No. 2) (Tr. 44-45). Rinaldi initialed the shorts, and on May 22, 1968, he transmitted them to Special Agent Francis Silas, Jr., of the FBI for analysis (Tr. 155-157). Mr. Silas, who worked in the Scientific Serology Unit of the FBI was qualified as an expert in body fluids. He testified that after receiving Government's

and Morgan was taken to D.C. General Hospital for an examination (Tr. 8-59).[7]

Dr. Patrick Lawrence, a physician specializing in internal medicine, testified that in the early morning hours of May 11, 1968, while on duty at D.C. General Hospital, he examined Lawrence Morgan pursuant to a request from Sergeant Rinaldi of the Sex Squad. Dr. Lawrence's examination, which was concentrated on Morgan's rectal area, revealed "a small superficial one inch long laceration at the position of 12:00 o'clock or the most superior portion of the—just external to the rectum; there was also a small amount of red blood in the area and a small amount of red blood within the rectum." (Tr. 63.) Because the blood was bright red rather than black, the doctor concluded that the laceration was a fresh one. Dr. Lawrence also testified that the laceration in Morgan's rectum was caused by the penetration of an object with "a modest amount of force . . ." (Tr. 60-65).

Three of the friends that were with the complainant in the playground prior to the crime then testified, corroborating the events that preceded the assault. Arthur Rochee identified appellant as the man that lured Morgan away from the group. Although he was heavier on the night of the crime, Rochee testified, "he had teeth missing as he does now" (Tr. 81). Additionally, Rochee remembered that on the night of the crime appellant had the same bald spot on the back of his head which he also had at trial. Finally, Rochee was positive of his in-court identification because "[h]is head was wide, it was big . . . and I don't forget a face" (Tr. 68-90).

Lawrence Berry, another of Morgan's friends, similarly identified appellant, stating that he had seen him at the play-

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Exhibit No. 2 from Sergeant Rinaldi, he analyzed certain stains found in the crotch area of these shorts and determined them to be caused by male semen. Mr. Silas, however, was unable to determine the age of the stains (Tr. 158-162).

[7] Even though appellant appeared to be about sixty pounds thinner at trial then he did when he assaulted Morgan, the complainant was positive of his identification of appellant. The "basketball area" of the playground was well lit, and he stated, "If someone has done something like that to me, I can't forget" (Tr. 54-55, 58).

ground several times before the night of the crime and knew him by the nickname of "Flob." Berry also testified that after he left the playground, he waited near Lawrence Morgan's home for the latter's return. When Morgan did return, he was running and "gasping for air and he was out of breath." Berry also noticed that the knee area of the complainant's trousers contained dirt and that his shirt, which had been tucked into his trousers prior to the crime, was not then tucked in (Tr. 91-110).

Billy Ross was the last of the complainant's friends to be called as a witness. His testimony was substantially the same as that of Larry Berry (Tr. 123-130).[8]

After Special Agent Silas' testimony and the introduction into evidence of the complainant's undershorts (Government's Exhibit No. 2), the Government rested. Appellant's motion for judgment of acquittal was then promptly denied (Tr. 179).[9]

The Case for the Defense

Other than a mere denial that he committed the offense, appellant's sole defense was insanity, and at no time during the proceedings did he move for a bifurcated trial.

Mrs. Rebecca Bennett, appellant's mother, and Willie Bennett, his brother, both testified that in April and May of

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[8] Two more of Morgan's companions on the night of the crime, Billy Clark and Michael Deacon, were available to testify for the Government at trial but were not called. The prosecutor stated that "their testimony will be repetitive and cumulative as to what has already been heard" (Tr. 176).

[9] After the defense put on its case, the Government was permitted to call Willis Griffin ("Rochester") as a witness even though his testimony was not strictly rebuttal evidence. Mr. Griffin was subpoenaed by the Government, but he did not appear until March 7, the last day of trial. He testified that he was with appellant in the playground on May 10, 1968, when they came upon young Morgan and his friends. Appellant, who was then sixty to seventy pounds thinner than at trial, asked Griffin if he knew the complainant. Griffin's response was, "I had seen him from my working in the playground" (Tr. 361). Shortly thereafter appellant engaged Morgan in a conversation, and the two disappeared from the rest of the group. Griffin then "went about [his] business" (Tr. 356-363).

1968 appellant's behavior was strange. His behavior was "[d]efinite[ly] unusual," his mother stated (Tr. 194-209).[10]

At first appellant testified that he did not know Morgan, nor did he know anything about the criminal incident of May 10, 1968, which was so graphically described in Morgan's testimony (Tr. 186). Later, however, appellant stated, "I am not denying the fact that something actually happened, but as far as I am concerned, that it was democratic [*sic*] and no matter how it happened, I was high on jive." (Tr. 191.) Appellant further testified that while he was in Saint Elizabeths Hospital for a mental observation in connection with the case at bar, he was treated with Thorazine which "helped me" (Tr. 188-189). When asked by defense counsel how he felt at trial, appellant stated, "I feel cool, and keep myself together" (Tr. 187).

The Government's Rebuttal[11]

Both Drs. Nicola Kunev and Mauris Plakin were psychiatrists at Saint Elizabeths Hospital.[12] Appellant was under Dr. Kunev's care during his sixty-day pretrial mental observation and during one of his prior stays at the hospital as well (July 1967 to March 1968; see note 15, *infra*). In addition, Dr. Kunev had studied appellant's medical records relating to his first period of treatment at the hospital (June 1965 to February 1966; see note 15, *infra*). During the pretrial mental observation appellant was observed on a twenty-four hour basis by the ward nurs-

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[10] Mrs. Bennett also testified that "Rochester" was a friend of her son and that in May 1968 appellant was substantially heavier than he appeared to be at trial (Tr. 200, 203).

[11] Because the defense psychiatrists were not present at the conclusion of the testimony of the lay witnesses, the trial court, at defense counsel's suggestion, permitted the defense to reserve their testimony until the conclusion of the Government's rebuttal (Tr. 209-210).

[12] Before permitting either doctor to testify, the trial court, in accordance with *Washington* v. *United States*, 129 U.S. App. D.C. 29, 390 F.2d 444 (1967), admonished both men to avoid conclusory testimony (Tr. 212-216, 292-293).

ing staff and underwent psychological testing and psychiatric evaluation by Dr. Kunev. At the conclusion of the sixty-day observation period, a three-hour diagnostic medical conference, attended by Drs. Kunev, Platkin and Winkler, was held relating to appellant's mental condition. During this staff conference appellant was personally interviewed by the psychiatrists for an hour and a half. After considering appellant's past records at the hospital, the results of the psychological testing, his own personal exposure to appellant during his last two stays at Saint Elizabeths, and the discussions at the medical staff conference, it was Dr. Kunev's opinion (and that of the other members of the staff conference as well) that appellant was not suffering from a mental illness or disease at either the time of the conference (October 16, 1968) or the time he committed the crime (May 10, 1968). Dr. Kunev testified that in his opinion appellant had malingered from the outset, trying to convince the doctors that he was mentally ill when in fact he was not. In explaining the underlying reasons for his conclusion, Dr. Kunev stated:

> We had to remove the conscious willing attempt of Mr. Bennett to convince us he is mentally ill and to look at his mental status, his mental condition, his orientation, his memory, the way he is aware of the charges, of the gravity of the charges, that he is facing, the way he reacts, the way he—the kind of feeling he presently has when he talks about his charges, and it required considerable effort, considerable deliberation and time to allow all this conscious willing attempt of Mr. Bennett to present himself as sick and after his appearance, his show that he was presenting was put aside, it was our opinion Mr. Bennett has a very good recollection of the events of the alleged events. He recalls minutely what happened prior to the offense, of the alleged offense, and following it. He expressed his own version of the story, his feeling about it, and he presented good orientation and he was in good contact with us during

> his stay in St. Elizabeths Hospital, and this was our basis for calling him without mental disorder. (Tr. 224-225.) [13]

Dr. Kunev further testified that appellant's attempts at convincing the hospital staff that he was mentally ill were prompted by his fear of returning to jail rather than being permitted to stay at the hospital (Tr. 210-239).

Dr. Platkin, the clinical director at John Howard Pavilion during appellant's pretrial sojourn there, testified that after reviewing appellant's medical history and the results of the psychological tests, observing his behavior at the staff conference and discussing appellant's situation with Dr. Kunev, he too concluded that appellant was without mental illness or disorder on May 10, 1968 (Tr. 290-325). Dr. Platkin was convinced that appellant was malingering because of appellant's ability to become rational and logical at the doctors' suggestion. When asked whether he observed any characteristics of schizophrenia in appellant's behavior, Dr. Platkin stated:

> Well, I observed them, but when I told him that I expected him to respond logically to what we were talking about, and that this kind of behavior [acting and speaking in a disorganized manner] did not get anywhere, we weren't making any progress. I discussed of what [*sic*] was at issue and he was able to come right back to earth and talk about the matters, at issue and he could talk logically and clearly about them with appropriate gestures, appropriate emotional expression. (Tr. 317-318.)

Such adjustments, Dr. Platkin stated, were atypical of schizophrenics. "Mentally ill people can understand a lot

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[13] Dr. Kunev testified that because of appellant's good orientation and his ability to observe other patients at Saint Elizabeths, he would apply "the diagnoses that are available in the hospital" to himself. The doctor stated that mentally ill people do not respond in this way but rather that, "[a]ccording to them [genuinely mentally ill patients], they are the ones who are normal, everything around is abnormal" (Tr. 238).

of what is going on about them, but when they do behave in this bizarre fashion, they are not acceptable to any kind of logic or scolding or corrective advise [*sic*]." (Tr. 318.)

Drs. Donald Goldberg and Edward Kirby, psychiatrists associated with the Legal Psychiatric Service, testified in appellant's behalf. Dr. Goldberg examined appellant five times between May 1965 and March 1967.[14] At the time of this first examination, a twenty-minute interview, Dr. Goldberg diagnosed that appellant was suffering from "acute, undifferentiated schizophrenic illness," and as a result appellant was transferred to Saint Elizabeths (Tr. 261). At each of the four subsequent interviews, Dr. Goldberg reaffirmed his diagnosis and stated that each of these diagnoses was premised on his original evaluation of appellant's condition in May 1965.[15] Additionally Dr. Goldberg stated that since he had not examined appellant since March 1967, he could not determine the magnitude of appellant's illness at the time of the crime, nor could he state whether or not the crime was related to the alleged illness. Finally the doctor testified that some of the persons he examined would sometimes attempt to feign mental illness. "I could be fooled," he admitted, especially if the examination was a short one.[16] (Tr. 280, 257-289.)

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[14] Appellant was referred to Dr. Goldberg because of his erratic and trouble-making behavior at jail while serving another sentence in an unrelated case (Tr. 284).

[15] As stated above, appellant had two previous stays at Saint Elizabeths prior to the pretrial mental examination in this case. Each of these visits involved transfers from the jail to the hospital on the recommendation of Dr. Goldberg. In each instance appellant was treated at the hospital and discharged as "socially recovered." Dr. Kunev testified that "socially recovered" meant that "there was not evidence of mental illness at the time he was discharged, but because he has already a diagnosis, we have to call it socially recovered because he already was diagnosed by other doctors [*i.e.*, Dr. Goldberg] as being mentally ill. But socially recovered doesn't mean that he remains ill. It only means at the time of the discharge he has no mental illness." (Tr. 246, 249-250.)

[16] Dr. Platkin testified that a Legal Psychiatric Service doctor, when examining an inmate to determine whether he should be transferred from jail to the

Dr. Kirby testified that at the request of the Acting Superintendent of the Department of Corrections he examined appellant on January 10, 1969. Appellant again had been acting in a recalcitrant manner while in jail, and the purpose of Dr. Kirby's examination "was to determine whether or not hospital treatment was necessary" (Tr. 340). The doctor stated that during this examination appellant acted in such a wild and incomprehensible fashion[17] that the interview was terminated after only ten minutes. On the basis of this brief interview and having in mind Dr. Goldberg's previous diagnosis,[18] Dr. Kirby concluded that appellant was suffering from schizophrenia at the time of the interview. He did not offer an opinion as to whether appellant was mentally ill when he committed the crime and, if so, whether the crime was causally related to the illness (Tr. 337-355).

The defense then rested, and after Mr. Griffin's testimony (see note 9, *supra*), appellant's renewed motion for judgment of acquittal was denied.

ARGUMENT

I. Nothing in Dr. Kunev's testimony violated the evidentiary doctor-patient privilege.

(Tr. 212-216, 223-226)

Appellant argues here, as he did in the trial court, that a certain portion of Dr. Kunev's testimony violated the con-

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hospital, "does at best make a cursory examination" (Tr. 320). Dr. Kunev similarly testified (Tr. 252).

[17] During the interview appellant himself, using psychiatric terms, told Dr. Kirby that he was a schizophrenic and that he was called a "wild man" by the people at Lorton (Tr. 343). See notes 13 and 14, *supra*.

[18] While Dr. Kirby knew that his colleague, Dr. Goldberg, had classified appellant as a schizophrenic, he did not have the benefit of reviewing appellant's records at Saint Elizabeths, nor did he know that three psychiatrists at the hospital had found appellant to be free of mental illness (Tr. 343).

fidential privilege existing between a doctor and his patient. In support of this argument appellant contends that 18 U.S.C. § 4244 [19] specifically "prohibits the use against him on the issue of guilt of any statement made by the accused in the course of such [mental] examination" (Brief for Appellant at 17). We agree with appellant that a defendant's psychiatrist may not testify as to matters directly related to the issue of guilt or innocence, but we strongly disagree with appellant's assertion that Dr. Kunev made any such comments in the case at bar.

Because appellant raised a defense of insanity, he may not rely on the doctor-patient privilege as to testimony relevant

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[19] 18 U.S.C. § 4244 provides:

Mental incompetency after arrest and before trial.

Whenever after arrest and prior to the imposition of sentence or prior to the expiration of any period of probation the United States Attorney has reasonable cause to believe that a person charged with an offense against the United States may be presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense, he shall file a motion for a judicial determination of such mental competency of the accused, setting forth the ground for such belief with the trial court in which proceedings are pending. Upon such a motion or upon a similar motion in behalf of the accused, or upon its own motion, the court shall cause the accused, whether or not previously admitted to bail, to be examined as to his mental condition by at least one qualified psychiatrist, who shall report to the court. For the purpose of the examination the court may order the accused committed for such reasonable period as the court may determine to a suitable hospital or other facility to be designated by the court. If the report of the psychiatrist indicates a state of present insanity or such mental incompetency in the accused, the court shall hold a hearing, upon due notice, at which evidence as to the mental condition of the accused may be submitted, including that of the reporting psychiatrist, and make a finding with respect thereto. No statement made by the accused in the course of any examination into his sanity or mental competency provided for by this section, whether the examination shall be with or without the consent of the accused, shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding. A finding by the judge that the accused is mentally competent to stand trial shall in no way prejudice the accused in a plea of insanity as a defense to the crime charged; such finding shall not be introduced in evidence on that issue nor otherwise be brought to the notice of the jury.

to his mental competency or sanity. 14 D.C. Code § 307 (b)(2);[20] *see Edmonds* v. *United States*, 104 U.S. App. D.C. 144, 260 F.2d 474 (1958) (*en banc*);[21] *Parker* v. *United States*, 98 U.S. App. D.C. 263, 235 F.2d 21 (1956). Although appellant would have this Court believe that the challenged portion of Dr. Kunev's testimony was relevant not to his sanity but rather only to his guilt, a contextual analysis of the testimony compels a contrary conclusion. In accordance with this Court's teachings in *Washington* v. *United States*, *supra* note 12, the trial court meticulously cautioned Dr. Kunev against giving a naked medical opinion without reciting the underlying reasons for his conclusion (see Tr. 212-216). Accordingly, after the doctor gave his opinion that appellant was not afflicted with a mental illness, the prosecutor undertook to do just what *Washington* requires, that is, to elicit the factual basis for this conclusion. This is evidenced by the prosecutor's question to Dr. Kunev:

> Now, Doctor, would you please tell us what there was you knew of the defendant, taking into consideration

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[20] 14 D.C. Code § 307 provides in pertinent part:

> (b) This section [relating to the doctor-patient privilege] does not apply to . . .
>
> * * * * *
>
> (2) evidence relating to the mental competency or sanity of an accused in criminal trials where the accused raises the defense of insanity. . . .

[21] *Edmonds* specifically states:

> [T]here is no conflict between this provision [14 D.C. Code § 308, the verbatim predecessor of the present 14 D.C. Code § 307 (b)(2)] and 18 U.S.C. § 4244 barring a doctor's revelation of the accused's statements relating to "guilt". The legislative history of the Act of August 9, 1955, makes it clear and explicit that Congress meant to remove the privilege from statements relevant to mental competency or sanity, but to leave privileged statements relevant to guilt or innocence. 104 U.S. App. D.C. at 146, 260 F.2d at 476.

> the psychological testing and all the other observations you described, that caused you to, and the other members of the staff conference, to reach such a conclusion? (Tr. 223-224.)

In response the doctor gave the factual reasons underlying his conclusion that appellant was malingering, one of which was the statement now challenged on appeal:

> He recalls minutely what happened prior to the offense, of the alleged offense, and following it. He expressed his own version of the story, his feeling about it, and he presented good orientation and he was in good contact with us during his stay in St. Elizabeths Hospital, and this was our basis for calling him without mental disorder. (Tr. 224-225.)

In short, Dr. Kunev's factual statement was directly relevant to appellant's questioned sanity and therefore was not privileged. Indeed, if the doctor had failed to relate this important reason for his psychiatric opinion, a serious question would have arisen as to whether appellant's rights under *Washington* were violated.[22]

II. Appellant was not entitled to a bifurcated trial.

(Tr. 186, 191)

The granting of a bifurcated trial lies within the sound discretion of the trial court, and the burden clearly rests on a defendant seeking bifurcation to raise the issue and demonstrate to the trial court his particular need for having his insanity defense and the defense on the merits consid-

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[22] Appellant flatly states that the trial court overruled his objection to Dr. Kunev's statements "on the basis that appellant himself had already admitted the offense during his own testimony" (Brief for Appellant at 16). Appellant, however, is being overly selective in his excerpting of the record. While the trial court made a reference to the fact that appellant did not deny committing the sodomy, again a contextual reading of the record reveals that he overruled appellant's objection because Dr. Kunev's statement provided factual underpinning for his psychiatric conclusion (see Tr. 226).

ered separately. *Higgins* v. *United States*, 130 U.S. App. D.C. 331, 401 F.2d 396 (1968); *Parman* v. *United States*, 130 U.S. App. D.C. 188, 399 F.2d 559, *cert. denied*, 393 U.S. 858 (1968). In the case at bar appellant at no time sought to raise the issue of bifurcation in the trial court. We submit that he is therefore precluded from doing so on appeal.[23]

In any event, under the prevailing standards appellant was not entitled to a bifurcated trial. "Bifurcation may be granted in the sound discretion of the court when the defense can muster *substantial defenses both on the merits and on the question of criminal responsibility* which cannot be presented in the same proceeding without confusion or prejudice to either defense." *Washington* v. *United States*, 136 U.S. App. D.C. 54, 56, 419 F.2d 636 (1969) (emphasis added). *See also United States* v. *Ashe*, 138 U.S. App. D.C. 356, 427 F.2d 626 (1970); *United States* v. *Grimes*, 137 U.S. App. D.C. 184, 421 F.2d 1119 (1969). In the case at bar appellant's defense on the merits was at best a bare denial that he committed the offense,[24] which does not satisfy the requisite need of showing a substantial defense. *Contee* v. *United States*, *supra* note 23, 133 U.S. App. D.C. at 262, 410 F.2d at 250; *Harried* v. *United States*, 128 U.S. App. D.C. 330, 333, 389 F.2d 281, 284 (1967). Since appellant did not

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[23] Appellant cites *Contee* v. *United States*, 133 U.S. App. D.C. 261, 410 F.2d 249 (1969), for the proposition that a "request by defense counsel for bifurcation is not a prerequisite to the exercise of the trial court's discretion" (Brief for Appellant at 19). A careful reading of *Contee*, however, reveals that it does not stand for this *carte blanche* proposition. In *Contee*, this Court stated that "the trial court should be alert to the need for separate trials whenever the accused proposes to present an insanity defense, regardless of whether defense counsel makes an initial request or an initially sufficient showing of need." 133 U.S. App. D.C. at 262, 410 F.2d at 250. We take this to mean only that the trial court should not blind itself to a situation that obviously requires bifurcation. As will be discussed hereafter, no such situation existed in the case at bar.

[24] Appellant was the only *defense* witness who testified on the merits, if it could be called the merits. At first he denied committing the crime without elaboration (Tr. 186). Later in his testimony he stated, "I am not denying the fact that something actually happened, but as far as I am concerned, that it was democratic [*sic*] and no matter how it happened, I was high on jive." (Tr. 191.)

have a substantial defense on the merits, he was not entitled to a bifurcated trial.

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.[25]

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
CHARLES H. ROISTACHER,
Assistant United States Attorneys.

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[25] Appellant also argues that his rights under *Brady* v. *Maryland*, 373 U.S. 83 (1963), were violated because "[a]t no place in their testimony did the Government psychiatrists advise the jury that appellant was being administered psychotropic medications during the period of observation . . ." (Brief for Appellant at 12). His argument is totally meritless. To spare the possibility of the innocent being convicted, *Brady* teaches that the prosecution may not suppress evidence "favorable to an accused upon request . . . where the evidence is material to either guilt or punishment. . . ." 373 U.S. at 87. *See also Levin* v. *Clark*, 133 U.S. App. D.C. 6, 408 F.2d 1209 (1967).

To demonstrate that he received medication while at Saint Elizabeths Hospital, the appendix to appellant's brief goes beyond the record and includes a letter from the hospital addressed to his appellate counsel indicating that he received psychotropic drugs while at the hospital. This evasion of the record is unnecessary because, contrary to the way appellant now chooses to interpret it, the record is replete with testimony indicating that appellant received medication while at Saint Elizabeths (see Tr. 263, 313, 351). In fact appellant himself testified to this effect (Tr. 188). Since both appellant and his trial counsel knew that he received the medication, it cannot be seriously argued that the Government somehow suppressed this information.

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REPLY BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS

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No. 24,387

UNITED STATES OF AMERICA,

Appellee

v.

WILLIAM BENNETT,

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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Date: April 20, 1971

Due Date: April 20, 1971

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REPLY BRIEF FOR APPELLANT

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APPEAL FROM THE UNITED STATES DISTRICT COURT
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This reply is filed by appellant without waiving his objection to the Government's unexplained failure to file its brief on time.

I. FAILURE TO DISCLOSE IN VIOLATION OF BRADY.

Appellant's principal argument is that the Government psychiatric witnesses failed to disclose to the jury material facts relating to their psychiatric examination of appellant, in violation of the rule of Brady v. Maryland, 373 U.S. 83 87 (1963). Specifically, it was not disclosed that so-called psychotropic drugs were administered to appellant during the

60-day period of psychiatric observation.[1] The purpose of these drugs is to suppress the behavior which is symptomatic of schizophrenia. Yet, the Government psychiatrists' opinions of sanity were based upon the absence of such symptoms. For example, the chief Government psychiatrist, Dr. Platkin, testified that his opinion was based on:

> "Well, actually, in effect the absence of any symptomology [sic] which in my opinion would indicate he was suffering from a mental illness." (Tr. 296)

The Government's answer to this argument is appended as a footnote to its reply brief. (Government's Brief, p. 18, n. 25) Apparently, it agrees with the legal proposition that Brady requires disclosure of information of the nature here involved. It claims that disclosure was made and cites four pages of the transcript. Closer examination shows that those references do not support the Government's position.

(1) Transcript p. 263: Dr. Goldberg, a psychiatric witness for appellant, was asked a hypothetical question concerning his 1965 diagnosis of appellant. (Tr. 261) He was

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1/ Appellant obtained this information from officials of St. Elizabeths Hospital. The Government has not objected to the inclusion of such information as Appendix A to appellant's brief.

asked the meaning of the term, "socially recovered," if following that diagnosis, appellant had been treated in Saint Elizabeths for eight months and "apparently gave him some drugs and some medication." This hypothetical question did not establish that appellant was given medication at any time, but more importantly, the question did not even relate to the 1968 observation period upon which the Government psychiatric opinions were based.

(2) Transcript p. 313: On cross-examination, Dr. Platkin was questioned concerning appellant's prior commitments to St. Elizabeths in 1965 and 1967. This questioning contained a passing reference to "medicine." The witness' answer on the following page is particularly enlightening with respect to the issue here involved:

> "Please understand my examination was not only in the light of his previously having been there, but in the light of the time he was there while I examined him, this most recent time he was in the hospital, and the circumstances under which he came to us were somewhat different in the light of that most recent examination, that is some sixty odd day period he was there. In light of that hospitalization, my personal examination of him and the examinations that were made by others of him and taking the total picture, I could not find at the time I examined him that there were present any mental illness, Mr. Fields." (Tr. 314; emphasis added)

(3) Transcript p. 351: In argument at the bench and outside the hearing of the jury, appellant's trial counsel stated:

> "The man, as I understand, was given medication. He was given Thorozene and some other type of medicine, the doctor stated. He was sent there for the purpose of treatment. I assume the hospital did treat him. He was sent there, St. Elizabeths, for incarceration, it is in my opinion not so." (Tr. 351)

Again, it is clear from the preceding page that counsel was referring to the periods of commitment in 1965 and 1967.

(4) Transcript p. 188: The Government contends that appellant and his trial counsel knew of the administration of medication during the observation period because of the following statement by appellant:

> "Q. This last time you were in, what did they treat you for this last time you were in St. Elizabeths?
> A. For observation.
> Q. Did they give you any treatment?
> A. They gave me --
> Q. Did they give you any medicine?
> A. Some thorazene.
> Q. Did it help you?
> A. (no response.)
> Q. Did the medicine give you help?
> A. Yes, it helped me. Then I went to Lorton again, and they gave me some more thorazene.
> Q. Did this medicine help you?
> A. Yes, it helped me." (Tr. 188-189)

For all this meant to the jury -- or, for that matter, anyone who has not had the benefit of technical explanation -- appellant might as well have said he was given Bufferin.

Surely, the Government is not contending that the use of a technical drug name in the generally incoherent testimony of a defendant is the disclosure required by Washington v. United States, 129 App.D.C. 29, 390 F.2d 444, 457-458 (1967). In the first place, it is not so much the name of the drug which is important, it is the effect upon appellant's behavior which should have been explained to the jury. Secondly, that explanation is explicitly required by Washington to be in the testimony of the Government psychiatrists. They are specifically directed in that opinion to explain to the jury what they did during the period of observation and any "uncertainties" in their opinion.

The two Government psychiatrists went to extraordinary lengths to detail the allegedly thorough procedures followed during the observation period. They also took every opportunity to denigrate the opinions of the defense psychiatrists because the latter were not based upon lengthy observations. Yet, the extremely important fact that appellant was being given drugs was strangely absent from their testimony. This

was a patent evasion of the requirements of the Washington case, and thus, a violation of the Brady rule and appellant's Constitutional rights.

II. DISCLOSURE OF PRIVILEGED COMMUNICATION.

The Government agrees with the contention of appellant that disclosure by a Government psychiatrist of a defendant's statements to him relating to guilt or innocence is barred by statute. However, it argues that the testimony in question (Tr. 224-225) was permissible as "relevant to his sanity" (Government's Brief, pp. 13-14) and was permitted by the trial court as "factual underpinning" for the psychiatric opinion. (Government's Brief, p. 15, n. 22)

It has not been made clear what relevancy the objected-to testimony had to the question of sanity. The trial court did not, as required by Edmonds v. United States, 104 App. D.C. 144, 260 F.2d 474, 477 (1958), rule on that issue. Rather, the trial court admitted the testimony solely because he mistakenly believed [2] that appellant had already made a judicial confession of the crime and despite his misgivings as to the propriety of the testimony absent the supposed

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2/ The basis for this mistake is discussed at pp. 17-18 of appellant's brief.

confession. This is made clear in the following statements:

> "Well, under some circumstances, I might be concerned with that [i.e., admission of confidential communication] except the defendant himself testified practically the same thing, not denying the act." (Tr. 225-226)

> "I might be concerned about the correctness with which that generalization [i.e., the statements to which appellant objects] was offered as a basis for the diagnosis were it not for the fact that the defendant himself had taken the stand and said I did not deny it, that these events took place." (Tr. 226-227)

III. BIFURCATED TRIAL.

Appellant has not argued that Contee v. United States, 133 App.D.C. 261, 410 F.2d 249 (1969), establishes a "carte blanche proposition" which requires automatic bifurcation. (Government's Brief, p. 16, n. 23) That decision does, however, refute the Government's contention that failure to request bifurcation at the trial precludes the raising of that issue on appeal. This Court said in Contee:

> "As noted in Holmes, supra, a unitary trial involving both the merits and the issue of criminal responsibility is replete with potential sources of prejudice. Accordingly, especially since the cost of bifurcation to substantial state interests is often minimal or even negative, the trial court should be alert to the need for separ-

> ate trials whenever the accused proposes to present an insanity defense, regardless of whether defense counsel makes an initial request or an initially sufficient showing of need. In this area as in others, the realities of the contemporary criminal process, in which commonly indigent defendants are often represented by counsel unfamiliar with the intricacies of criminal law and procedure, require the trial court's active concern to ensure the fairness of the trial." (410 F.2d at 250; emphasis added)

The trial court must decide in its discretion whether the requisite elements for bifurcation exist. In this proceeding, the trial court failed to exercise its discretion. It is appellant's position that his substantial defense on the grounds of insanity was materially prejudiced by the introduction before the jury of voluminous and minutely detailed evidence of the alleged sexual offense. 3/ Secondly, it is appellant's position that he presented a sufficient defense on the merits of the charge to warrant bifurcation within the guidelines laid down by Contee, which stated that

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3/ The Government obviously believes such material to be prejudicial to appellant because, although they have no relevance to the legal issues here presented, a substantial portion of its brief to this Court consists of extensive recitation of all the lurid details of the sex crime charged.

questions of doubt should be resolved in favor of bifurcation where the evidence on criminal responsibility does not significantly overlap the evidence on the merits. (410 F.2d at 250) United States v. Grimes, 137 App.D.C. 184, 421 F.2d 1119 (1969), is distinguishable because the defendant there presented no defense on the merits whatsoever, but simply put the Government to its proof. The Court in that case stated:

> "We do not, in order to affirm here, need to say that there is no conceivable case where bifurcation would not be in order despite the failure to defend on any ground other than insanity. Perhaps Parman 4/ was such a case, since this court took no special note of the colloquy, quoted in its opinion [footnote omitted], wherein counsel made clear that he had no defense on the merits other than the weakness of the Government's proof and rested its finding of no abuse of discretion upon counsel's insistence upon two juries." (421 F.2d at 1122)

WHEREFORE, appellant submits that the Government's brief does not demonstrate factual or legal errors in the arguments made by appellant and that the judgment of the

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4/ Parman v. United States, 130 App.D.C. 188, 399 F.2d 559, cert. den., 393 U.S. 858 (1968).

District Court should be reversed and this proceeding remanded as prayed in appellant's brief.

Respectfully submitted,

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Date: April 20, 1971

Due Date: April 20, 1971

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief was personally served upon the United States Attorney this 20th day of April, 1971.

J. G. Dail, Jr.